

IN THE TWENTY-FIFTH CIRCUIT FOR THE STATE OF MISSOURI

Circuit Court of Phelps County

**FILED**

**JAN 11 2018**

SUE BROWN, CIRCUIT CLERK  
PHELPS COUNTY, MO.

In re:

Area 25 Public Defender Office

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Case No. 17PH-CV02226

FINDINGS AND ORDER

The District Defender of the Area 25 Office of the Public Defender System, together with the Deputy District Defender, came before the Court on December 27, 2017. The date and time for the hearing had been set beforehand although the Motion for Conference pursuant to Sec. 600.063 RSMo was not filed until that afternoon. Prosecutors for Phelps, Pulaski and Texas Counties were informed of the scheduled conference beforehand and the Prosecutors for Texas and Pulaski Counties were in attendance. Also in attendance was the Director of the State Public Defender System as well as several Assistant Public Defenders.

Preliminarily, the Court notes Sec. 600.063 RSMo requires approval by the Public Defender Director or the Commission (600.063.1) but the Director's attendance and participation in support of Movant assumes that approval.

Furthermore, Movant's suggestion that Prosecutor's lack standing to participate in the conference is moot. In any case, Sec. 600.063.2 presumes, infers and anticipates that participation. Movant's motion that prosecutors have no standing and to allow their participation makes the statute unconstitutional is denied.

Movant has also filed suggestions to the effect that Sec. 600.062 & 063 RSMo are unconstitutional to the extent they conflict with the Rules of Professional Conduct and that those statutes do not provide the exclusive remedy for addressing excessive case load. The Court does not need to decide those issues since Movant has chosen to avail itself of those statutes and procedures.

This Court notes at the outset that Public Defenders are called upon to provide the highest level of representation to indigent defendants. The Court observes that the Defenders in the Area 25 Office routinely do that, sometimes under difficult circumstances.

The Court notes Sec. 600.063 RSMo permits this Court to grant relief “based upon a finding that the individual public defender or defenders will be unable to provide effective assistance of counsel due to case load issues.” However, that statute fails to set out the applicable standard or burden of proof to make that determination. Without further guidance the Court adopts a preponderance of the evidence standard.

Movant argues that the Missouri Supreme Court, in disposing of *In Re Hinkebein*, SC96089, put the Public Defenders in the impossible position of violating ethical rules about acceptance of cases if they feel their caseload is too high. The Supreme Court, to this Court’s knowledge made no such ruling in *Hinkebein*, but, in any case, that has been the law since at least *State ex rel Waters*, 370 S.W.3d 592 (2012). Presumably that is why the legislature enacted Sec. 600.063 RSMo in 2013.

Movant has provided the Court with figures for “Cases Initiated by County.” (Part of Movant’s Exhibit L) For Phelps, Pulaski and Texas Counties this shows cases have risen 14.38% from 2015 to 2017. However, the Court notes this rise is almost exclusively in C&D or low level felonies. A&B felonies for those counties have gone up only 6.48% from 2015 to 2017 and, in fact, fell 10.28% from 2016 to 2017. The Court does not have the benefit of further research in the matter but strongly believes the rise in lower level felonies can be attributed to drug cases; part of the “opioid crisis.”

Movant has also provided the Court with the results of application of the Area 25 case load to both the “Old NAC Standard” and “The Rubin Brown Standard” which suggests Movant needs five attorneys each for the Phelps and Pulaski Counties and three attorneys for Texas County. None of those counties currently has that manpower. The Court is not persuaded by these studies/standards sufficiently to place reliance thereon. The “NAC Standard” imposes a numerical limit of 150 felony cases per year/ per lawyer, without regard to the types or complexities of those cases. “The Rubin Brown” study

assigns a number of hours per case based on the type of case but those assignments do not coincide with this Court's experience.

The Court believes it must apply its own experience of 35 years as a trial attorney in the same counties served by the Area 25 Office; over 23 of those years as a criminal defense lawyer and 11 ½ years in prosecution, augmented by the similarly vast experience of his colleague on the Circuit Bench, Hon. William E. Hickie.

This Court knows no attorney should accept employment as a trial attorney, whether Public Defender, Prosecutor or associate in a law firm primarily doing trial practice, and expect to work only 40 hours a week. To paraphrase the late Justice Joseph Story of the U.S. Supreme Court, "The law is a jealous mistress."

Movant raises the issue of significant turnover in the Area 25 Office, especially compared to the experience of District Offices in more metropolitan areas. There is no particular evidence to suggest this is directly related to caseload issues versus new lawyers preferring to practice in areas with more social opportunities. To the extent turnover may be salary driven it is not a matter for this Court's consideration.

Movant advocates for use of a "wait list" to "triage" cases awaiting assignment to Assistant Public Defenders. The Area 25 Office has already started doing that without benefit of the procedure mandated by Sec. 600.063 RSMo. This Court is unable to understand how use of a "wait list" does other than to "kick the can down the road." Moreover, if Public Defenders have a statutory and ethical obligation to provide counsel and representation to indigent defendants how are they not violating those obligations by placing such a Defendant on a "wait list" and allowing him or her to stay in jail until they get to that case?

Movant has provided the Court with Exhibits A, D, F, G, H & K, affidavits of the several Assistant Public Defenders professing to be unable to provide adequate assistance to their clients because of excessive caseload. Those caseloads, as recited in the affidavits, range from 39 to 82 with one affidavit failing to recite that defender's numerical caseload. These caseloads are not inconsistent with this Court's experience as a practitioner, nor as a prosecutor, nor what it knows about the caseload of Public Defenders in years past.

Accordingly, this Court does not find that the individual Defenders named in Movant's Motion will be unable to provide effective assistance of counsel due to caseload issues and Movant's Motion is denied.

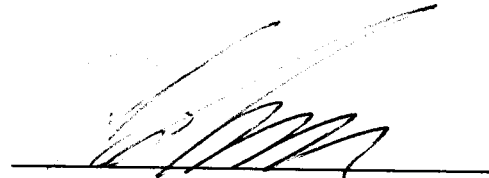
Further, Movant is hereby ordered to cease immediately any use, or purported use, of "wait lists" in assignment of cases to Assistant Public Defenders.

This Court does, however, feels there are additional methods available to both the Area 25 Office and the Prosecutors that could alleviate workload of all involved. Those include:

1. The taking of depositions has expanded in criminal cases, undoubtedly due in part to use of grand juries in Texas, Phelps and Pulaski Counties in lieu of preliminary hearings. Defendants have a right to take depositions and this Court would never interfere with that right. However, not all witnesses need to be deposed. Taking depositions that do not further the defendant's planned defense wastes time and money for all involved. Assistant Public Defenders with less experience should rely on the District Defender and his Deputy as to when such expenditure of time and money is warranted.
2. Some defendants, especially those incarcerated on lower level felonies may want to accept an offer from the state. If the Defendant admits guilt to counsel and indicates a desire to accept the State's offer, delay in doing so on the part of defense counsel could be a disservice to the client and potentially violate Rule 4-1.2(a) of the rules of professional conduct. In those cases an appropriate record can be made if discovery is not complete but the Defendant wants to proceed anyway.
3. It has happened frequently that a Defender will have upcoming trials and those trials delayed, and Defendants left in jail, when their lawyer is transferred to another county within Area 25 and a new Defender assigned. This needs to stop.
4. Prosecutors should, to the extent able, implement a practice of pro se disposition of low level felonies, if appropriate. Such a "pro se docket" was implemented for misdemeanors several years ago and proved highly effective to reduce Public Defender caseloads. A "drug possession pro se docket" would likely be beneficial as well.

5. To the extent possible, the District Defender and Deputy District Defender should re-examine the methods and procedures by which they assign cases and Defenders to counties to see if modification could result in more effective and efficient utilization of Public Defender resources.

**IT IS SO ORDERED THIS 11<sup>TH</sup> DAY OF January, 2018.**

A handwritten signature in black ink, appearing to read "John D. Beger", is written over a horizontal line.

John D. Beger, Presiding Judge  
25<sup>th</sup> Judicial Circuit